No. 93-18

JUN 14 1993
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LELAND AND KARLA SWENSON,
Petitioners

v.

OGLALA SIOUX TRIBE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

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QUESTIONS PRESENTED

1. Does the Indian Child Welfare Act confer on a state trial court a right which under general principles of Indian law is reserved to tribes themselves, i.e. the right to determine who is or is not eligible for tribal membership?

2. Do the requirements of the Indian Child Welfare Act, which are founded on the trust doctrine, apply to the voluntary adoptive placement of an illegitimate child born to a non-Indian mother, when the tribe has not made a conclusive determination at the time of the proceedings whether the child is eligible for membership, and when neither the mother nor the child has any ties to a tribe or a reservation, and the child is not being removed from an Indian home or family?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Leland and Karla Swenson and the respondent the Oglala Sioux Tribe. The putative father Jeff Nothelphim was a party to the original proceedings. He did not appeal or participate in the appellate proceedings and is therefore not named as a party herein. The child Baby Boy Doe was the relator in the underlying proceedings.

The respondent before this Court is the Oglala Sioux Tribe.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LELAND AND KARLA SWENSON, Petitioners,

v.

OGLALA SIOUX TRIBE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

The petitioners Leland and Karla Swenson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Idaho Supreme Court entered on March 19, 1993.

OPINIONS BELOW

The opinion of the Idaho Supreme Court is reprinted in Appendix A, at p. 1a.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on March 19, 1993, reversing the district court's ruling that the Indian Child Welfare Act did not apply to the facts of this case. No petition for rehearing was filed. The jurisdiction of this

Court is invoked under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

25 U.S.C.§§ 1901-1963, the Indian Child Welfare Act

STATEMENT OF THE CASE

The central issue of this case is whether the Indian Child Welfare Act (hereinafter "ICWA") governs custody proceedings for an illegitimate child who has only a genetic connection with an Indian tribe, not having been determined to be eligible for membership by the interested tribe at the time of the proceedings; who was born to a non-Indian mother with no ties to an Indian family, tribe, or reservation; and, who is not being removed from an Indian family or an Indian tribal or cultural setting. The interpretation and application of the ICWA, a federal question, was initially raised at pretrial proceedings.

Leland and Karla Swenson filed a petition to terminate the parental rights of Jeff Nothelphim, the biological father of Baby Boy Doe on January 18, 1990. The Swensons gave notice as required by the Indian Child Welfare Act (hereinafter "ICWA") to Jeff Nothelphim, to the Oglala Sioux Tribe (hereinafter "tribe"), and to the Bureau of Indian Affairs based on information received from the child's natural mother that Mr. Nothelphim may be a member of the Oglala Sioux Tribe. The tribe moved to intervene and its motion was granted. The court consolidated the proceedings related to the petition for the termination of parental rights and the petition to adopt. At a preliminary motion hearing, the court ruled that the ICWA would apply to

the proceedings. The parties proceeded with an evidentiary hearing pursuant to this ruling.

At the hearing the issues were (1) whether the child is an "Indian child" as defined by the ICWA; (2) whether the evidence supported a finding beyond a reasonable doubt that custody by the Indian father was likely to result in serious emotional or physical harm to the child; and, (3) whether there was good cause to set aside the placement preferences listed in the ICWA.

At the conclusion of the evidence, the court ruled that the ICWA did not apply to the proceedings. The court based its conclusion in part on an affidavit submitted by the tribe's enrollment director who stated that the tribe did not know if the child was eligible for enrollment. The tribe presented no evidence which verified to the satisfaction of the court that the tribe had determined that the child was eligible for tribal membership. The court also ruled that even if it was determined that the child was eligible for tribal membership, the ICWA did not apply because the ICWA was not intended to govern the placement of an illegitimate child of a non-Indian mother who had never been a part of an Indian family and was not being removed from an Indian home or tribe.

The biological father was never present at any of the proceedings. The court did, however, appoint counsel to represent him and his counsel was present throughout the proceedings. He did not appeal the termination of his parental rights. The child's mother agreed to voluntarily terminate her parental rights in favor of the petitioners in order to permit them to adopt her child.

The district court, sitting in an appellate capacity, affirmed the decision of the trial court, but on different grounds. It held that there was no evidence in the record which supported the finding that the putative father was actually the child's biologi-

cal father, and without such proof, the ICWA did not apply.

The Idaho Supreme Court reversed the lower court rulings, holding that the ICWA applied to the proceedings. It vacated the termination of parental rights and the adoption and remanded the case for further proceedings. The Idaho Supreme Court erroneously held that eligibility for tribal membership is not a factual matter based on the evidence presented by the tribe, but considered it to be a matter of law which the trial court not only has the full authority to determine, but also has the duty to do so if the tribe itself has not made the determination at the time the proceedings come before the court. It stated further that the trial court should have found that this child is eligible for tribal membership. The court stated that a trial court does not need a conclusive determination by a tribe that a child is eligible for tribal membership before the ICWA will apply to custody proceedings.

The opinion reflects a fundamental lack of understanding of certain key concepts of Indian law which Congress incorporated in the ICWA, such as tribal sovereignty and the federal trust doctrine. For example, when the Idaho court declares that a tribe need not make a conclusive determination whether the child is eligible for membership before it applies the ICWA, the court fails to recognize that the pivotal fact which makes the ICWA applicable to a child custody proceeding is the child's eligibility for membership in a federally recognized tribe. Without the tribe's determination of the child's eligibility, the child is not an "Indian child." The ICWA cannot be constitutionally applied to a child who simply has Indian blood but no membership in a federally recognized tribe.

The Idaho Supreme Court also held that the custody of a child who is not being removed from an Indian home or family is nevertheless subject to the provisions of the ICWA. It also

erroneously opined in dictum that the tribe was not represented or given the opportunity to present evidence at a hearing on the adoption. The clerk's records and files reflect that a notice of hearing was provided to the tribe through counsel and that counsel was present at the hearing. Counsel does not deny that they were present. The court itself states and the transcript clearly reflects that the tribe presented evidence on the issue of the placement preferences at the consolidated evidentiary hearing and advocated that custody of the child be given to a member of the biological father's extended family.

REASONS FOR GRANTING THE WRIT

I. The ruling by the Idaho Supreme Court that state trial courts may determine eligibility for membership in a tribe violates principles announced by this Court which recognize tribal sovereignty and prohibit courts from interfering with a tribe's internal processes regarding membership.

The United States Supreme Court has determined that a tribe's right to determine its members is a fundamental element of sovereignty. This Court granted certiorari to the Santa Clara Pueblo to settle the question of whether a federal court could apply equal protection arguments to restrict a tribe's right to determine who it will accept as members. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Julia Martinez sought to have her children admitted as members of her tribe, the Santa Clara Pueblo. However, the tribe had enacted a membership ordinance which barred the admission of children whose father was not a member of the tribe. In this case, because the children's

father was Navajo, they were denied membership. Mrs. Martinez objected on the basis that the tribe permitted the reverse, i.e. it admitted children to membership whose mothers were not Santa Clara so long as their fathers were. This Court held that Congress did not intend to permit courts to intrude on internal tribal matters, especially to adjust relations between tribes and their members. One of the fundamental sovereign rights of tribes is the right to determine who will be admitted to membership. *Santa Clara Pueblo* confirmed that courts may not interfere with a tribe's internal processes regarding membership.

A state trial court cannot make a binding determination of eligibility for tribal membership, even for purposes of applying the ICWA. If a tribe has not determined that a child is eligible for membership, the court cannot independently conclude that the child is so eligible.

The Bureau of Indian Affairs of the U.S. Department of the Interior has published a guide for use by courts in interpreting and applying the ICWA, which addresses the role of a state court in making the determination that a child is eligible for tribal membership. *See Guidelines for State Courts; Indian Child Custody Proceedings*, "Part III, Department of the Interior; Bureau of Indian Affairs;" 44 Fed. Reg. 67584 (November 26, 1979). The guidelines provide that a state court must inquire either of the tribe or of the Bureau of Indian Affairs whether or not a child is eligible for membership in a tribe.

> The *Guidelines* state at Section B:
>
> B.1. Determination That Child Is an Indian
>
> (a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's

> tribe. . .
> (b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.
> (ii) Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

Neither the ICWA nor the *Guidelines* confer any right or duty to make the determination of eligibility for tribal membership on a state trial court. The state trial court's role is to ascertain whether there is evidence that the tribe has determined that the child is eligible for membership. The state court must then make a finding of fact based on the evidence presented that the tribe has determined that the child is or is not eligible for membership. The court can then rule whether the child is an "Indian child" as defined in the ICWA.

The Idaho Supreme Court erred in concluding that a state court can determine tribal membership for purposes of the ICWA. In this case, the trial court made a finding of fact that the interested tribe had not determined whether the child was eligible for membership at the time the proceedings took place. The trial court then correctly concluded that the child did not fit the ICWA definition of "Indian child." A trial court may not apply the provisions of the Indian Child Welfare Act to custody proceedings of a child who has not been shown to fit the definition of "Indian child." The trial court correctly declined to do so in this case.

Eligibility for tribal membership is critical because Congress enacted the ICWA as an expression of its trust responsibility to

federally recognized tribes. The Act does not apply to individuals who may be Indian by blood, but who are not eligible for membership in a federally recognized tribe. The common element in virtually every case where the various jurisdictions have held that the ICWA applies is the proven and undisputed fact that the child is eligible for membership in the tribe.

The Idaho Supreme Court has misinterpreted and expanded the role of the trial court in ICWA proceedings by ruling that the trial court not only may, but must, make an independent determination of an individual's eligibility for tribal membership. This decision is contrary to well-settled principles of Indian law and should not be left uncorrected.

II. The decisions of the highest courts of the states interpreting the Indian Child Welfare Act are in conflict. The states need clear and definitive guidance from this Court to assist them in interpreting this federal law.

The courts of the several states that have considered the ICWA are divided into two positions, one of which applies the Act if there is a genetic connection between the child and an Indian tribe and the other, which applies the Act only if the child is being removed from an existing Indian environment.

The Supreme Courts of the states of Kansas, Oklahoma, Indiana, and the Court of Appeals of the state of Missouri have not applied the Act if there is only a genetic connection and have held that the ICWA is not applicable unless a child is being removed from an Indian family. These courts rely upon the Congressional declaration of policy which states that ". . .(I)t is the policy of this nation to protect the best interests of Indian

children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families . . .". 25 U.S.C. §1902.

This view is represented by the opinion of the Supreme Court of the State of Kansas in *Matter of Adoption of Baby Boy L.*, 643 P.2d 168 (1982). Baby Boy L. was born out of wedlock to a non-Indian woman. She executed a consent to adoption by specific adoptive parents. The child was never in the care or custody of the putative father and never was a part of any Indian family. The court held that the legislative history of the ICWA and the statute itself confirm that its purpose was to maintain family and tribal relationships and assure that certain standards would be observed in removing Indian children from their homes and tribes. The court said concerning the purpose of the ICWA:

> "It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother." Id. at 175.

See In the Matter of the Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988), cert. denied sub nom., J.Q. v. D.R.L., 490 U.S. 1069, 109 S.Ct. 2072, 104 L.Ed.2d 636 (1989); *In the Matter of the Adoption of Baby Boy D.*, 742 P.2d 1059 (Okl. 1985) reh'g denied (1987), cert denied sub nom., Harjo v. Duello, 484 U.S. 1072, 108 S.Ct. 1042, 98 L. Ed. 2d 1005 (1988); and, *In the Interest of S.A.M.*, 703 S.W.2d 603 (Mo.App.1986). These decisions emphasize that Congress' express purpose for enacting the ICWA was to establish minimum standards for the

removal of Indian children from their families.

Representative of those states who require only a genetic connection to an Indian tribe is Alaska. *See Matter of Adoption of T.N.F.*, 781 P.2d 973 (Alaska, 1989). The New Jersey Supreme Court, in *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988), held that the ICWA applied even though the child was not shown to be eligible for membership in the Rosebud Sioux Tribe. The court stated, "Congress intended that a child's eligibility for tribal membership be a question of fact dependent on his or her actual ancestry." Id. at 933.

This Court has examined the jurisdictional and procedural requirements of the ICWA in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L. Ed.2d 29 (1989), and affirmed the jurisdiction of a tribal court when an Indian child is domiciled on a reservation. Although the Court confirmed the ICWA's fundamental purpose, preventing the removal of Indian children from their Indian cultural setting, the question of whether the Act was intended to apply to the placement of a child such as the one in the instant case remains unanswered.

This case involves the adoption of an illegitimate child who was born to a non-Indian woman. Both she and the child were totally abandoned by the father when he learned that she was pregnant. The child's only relationship with a tribe is that his birth resulted from an insemination by a man who is a member of a tribe, but who had himself left the reservation many years before. He has children from a former marriage whom he does not contact nor support. Nor do the children have any contact with or support from the father's tribe or family. Those children are not enrolled members of the tribe. This child's mother made a difficult but considered decision that it was in his best interest

to voluntarily place him for adoption. She personally selected adoptive parents who were similar to herself in age, appearance, and religious affiliation. The child has lived with and bonded with the adoptive parents since he was one day old. Does the ICWA require the custody of a child born under circumstances such as these, with no tangible ties to a tribe, to be surrendered to a distant tribal government?

The most recent state court decisions concerning the interpretation of the ICWA, decided after *Holyfield*, come from the State of Washington and from the State of Oklahoma. The Washington Supreme Court held in *Matter of Adoption of Crews*, 118 Wash.2d 561, 825 P.2d 305 (1992), that the ICWA did not apply to the facts of the case because the Indian child was not being removed from an Indian cultural setting, the natural parents had no substantive ties to a specific tribe, and neither the parents nor their families resided or planned to reside on a reservation. The Washington Supreme Court added that in such circumstances, "whether or when a child meets the definition of `Indian child' under ICWA is not controlling." Id. at 311. The Oklahoma Supreme Court in *Matter of S.C.*, 833 P.2d 1249 (Okl. 1992) recently strongly resubscribed to the view that the purpose of the ICWA is to prevent the removal of Indian children from an existing Indian family unit.

The petitioners ask this Court to interpret and clarify the substantive provisions of the ICWA. Increasing numbers of Indian child custody cases are being appealed through the state court systems because the states and the litigants do not have a clear understanding of how to apply this federal law. Litigants and courts could be spared the costs of countless appeals. Children who have formed the strong bonds of a parent-child relationship with adoptive parents may be spared the pain and anguish of unnecessary separations.

State courts need guidance from this Court with respect to interpreting the Indian Child Welfare Act.

CONCLUSION

For these various reasons, the petitioners pray that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

1993 Opinion No. 29

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 19512

In the Matter of:	)	
BABY BOY DOE,		
A minor child.	)	Boise, November 1992 Term
	)	
	)	
INDIAN TRIBE,	)	
Intervenor-Appellant	)	
Appellant on Appeal,	)	
	)	
v.	)	Filed: March 19, 1993
	)	
JOE DOE and JANE DOE,	)	
	)	Frederick C.Lyon, Clerk
Petitioners-Respondents-	)	
Respondents on Appeal,	)	

Appeal from the District Court of the Third Judicial District of the State of Idaho, Canyon County. Hon. Dennis E. Goff, District Judge. Hon. Gary D. DeMeyer, Magistrate Judge.

Appeal from termination of parental rights by magistrate judge and award of attorney fees on appeal by district judge. Decision that the Indian Child Welfare Act does not apply, *reversed.* Termination of parental rights, *vacated and remanded.* Award of attorney fees, *reversed.*

Idaho Legal Aid Services, Inc. of Coeur d' Alene, Idaho, attorney for appellant. Shannon D. Work argued.

Underwood & Steele, Chtd., Boise, Idaho, attorneys for respondents. James S. Underwood argued.

JOHNSON, J.

This case concerns the application of the federal Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1923, to the termination of the parental rights of an Indian father and the adoption of his child by a non-Indian couple. We reverse the decision of the magistrate judge (the trial court) that ICWA does not apply to the termination proceeding and to the placement of the child. We vacate the termination order, and remand the case to the trial court for further proceedings. We also reverse the award of attorney fees by the district judge on appeal from the trial court's decision.

I.
THE BACKGROUND AND PRIOR PROCEEDINGS

The child who is the subject of this case was born in 1989. The mother is a non-Indian and was never married to the child's father. The child's father is an enrolled member of the Indian tribe (the tribe). The father maintained no contact with the mother during her pregnancy and has had no contact with the child since the birth. Shortly after the child was born, the mother approached an adoption agency to arrange adoption of the child. Through the agency, the mother chose a non-Indian couple (the adoptive parents) to adopt the child and placed the child in their custody. The child has remained with the adoptive parents throughout the course of this case.

After placing the child with the adoptive parents, the mother consented to voluntary termination of her parental rights and to the adoption of the child by the adoptive parents. The adoptive parents petitioned the trial court for termination of the parental rights of the child's parents. Because the mother indicated to the adoption agency that the child's father was a member of the tribe, the adoptive parents sent the required notice of the termination proceedings to the father and the tribe pursuant to federal guidelines and ICWA.

At the first hearing concerning termination of the father's parental rights, the father did not appear, but a non-attorney advocate from the tribe appeared at this hearing on behalf of the father and the tribe. The non-attorney advocate asserted that the father wanted custody of the child and that the tribe wished to intervene and have the trial court transfer the proceedings to tribal court pursuant to ICWA. The trial court appointed counsel to represent the father and granted the tribe additional time to move to intervene and to seek transfer of the case to tribal court.

On May 3, 1990, the trial court heard the motions to intervene and to transfer. In allowing the tribe to intervene, the trial court made an oral finding that the child was an Indian child and the ICWA governed the proceedings. This finding was based on a letter from the tribe's enrollment director indicating the father had applied to enroll the child in the tribe. The trial court stated that this letter was a determination by the tribe that the child was eligible for membership in the tribe. Because the mother filed an objection to the transfer of the case to the tribal court, the trial court rejected the transfer, as required by ICWA.

On May 21, 1990, the trial court held another hearing regarding termination of the father's parental rights. The tribe argued ICWA governed the proceedings and required the child to be

placed for adoption within the tribal community. The tribe advocated placing the child with the child's paternal aunt and uncle, who lived on the reservation and wanted to adopt the child into their family. The adoptive parents argued against application of ICWA and against placing the child on the reservation, even if ICWA applied to the proceedings.

The trial court ruled that ICWA did not govern the proceedings, and terminated the father's parental rights without applying the requirements of ICWA. Although the trial court found the father was the child's natural father and was a member of the tribe, the trial court ruled that the child was not an "Indian child" as defined in ICWA, because the child was not eligible for membership in the tribe. The trial court cited guidelines published by the Bureau of Indian Affairs (BIA) as controlling. These guidelines advise state courts to treat determinations by an Indian tribe regarding eligibility for membership in the tribe as conclusive. Based on an affidavit from the enrollment director of the tribe, the trial court found that the tribe had declined to find the child was eligible for membership in the tribe and that this meant the tribe had conclusively determined the child was not eligible for membership in the tribe.

As an alternative legal theory to support its ruling that ICWA did not govern the termination proceedings, the trial court adopted an "Indian family" test as a prerequisite to application of ICWA. Under this approach, the trial court held ICWA only applied to child custody proceedings in which an Indian child is removed from an existing Indian family. The trial court reasoned that even if the child met the definition of "Indian child," ICWA does not apply where a child has never lived within the Indian community or has never been exposed to Indian culture. In this case, the trial court found the child was not being removed from an existing Indian family because the child had either lived

with the non-Indian mother or the non-Indian adoptive parents since birth. The trial court also noted that the child had no contact with the father or any member of the father's family and that the father's family had not pursued a relationship with the child.

The trial court terminated the father's parental rights, and the tribe appealed to the district judge. The district judge affirmed the trial court's findings, but on different grounds from those stated by the trial court. The district judge held the child was not an Indian child because there was insufficient proof of paternity in the record to support a finding that the child was the legal child of the father. The district judge also found that the tribe brought the appeal frivolously, unreasonably, and without foundation and ordered the tribe to pay more than $8,500.00 in attorney fees pursuant to I.C. §12-121.

The tribe appealed to this Court, asserting the application of ICWA to the termination of the father's parental rights and to the placement of the child. The tribe also asserts that regardless of the application of ICWA, the district judge improperly assessed attorney fees against the tribe.

II.
THE PROVISIONS OF ICWA

In 1978 Congress passed ICWA to address concerns surrounding the high incidence of removal of Indian children from their Indian families and tribes and the placement of Indian children in adoptive or foster homes outside of their extended families, tribes and cultures. 25 U.S.C. §§1901, 1902. ICWA recognizes that cultural biases in child custody proceedings contribute to this problem. To promote the stability of Indian tribes and to counter cultural biases, Congress enacted ICWA to

provide minimum procedural and substantive requirements which state courts must apply to child custody proceedings involving Indian children.

In order to invoke the requirements of ICWA, state courts must first determine whether the proceedings are "child custody proceedings" as defined by 25 U.S.C. §1903(1), and whether the child involved is an "Indian child" as defined by 25 U.S.C. §1903(4). Without dispute, the proceedings in this case are "child custody" proceedings as defined in ICWA. ICWA expressly includes termination of parental rights proceedings within the statutory definition of child custody proceedings. §1903(1)(ii).

The basic dispute in this case is whether the child is an "Indian child" under ICWA. ICWA defines an Indian child as: "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." §1903(4). Whether the child meets this definition is discussed in the following section.

If these prerequisites are met, ICWA supplies procedural requirements and substantive standards that must be used by the state court instead of procedures and standards under state law. Several provisions of ICWA would apply to the proceedings in this case, if ICWA were applicable. ICWA requires that Notice of the proceeding be given to the Indian parent and the Indian tribe, and that the tribe be given the opportunity to intervene in the proceedings. §§191(c), 1912(a). Before terminating an Indian parent's parental rights, ICWA requires the state court to make a determination on the record that beyond a reasonable doubt termination is required to prevent serious emotional or physical damage to the Indian child. §1912(f). In an adoption proceeding, ICWA requires the state court to give preference to

placement of the child with a member of the child's extended family, with the tribe, or with another Indian family. §1915(a). In determining whether good cause exists for placement outside of the Indian community, the state court is directed to examine the reasons given in light of "the prevailing social and cultural standards of the Indian community." §1915(d).

III.
THE CHILD IS AN "INDIAN CHILD."

The Indian tribe asserts that the trial court misapplied federal guidelines in concluding the child is not an Indian child under ICWA, and therefore, incorrectly found ICWA did not govern the proceedings. We agree.

This appeal is taken from a decision of the district judge sitting as an appellate court. Where the same issue presented to the trial court was presented to the district judge, and the district judge, sitting in an appellate capacity, made a decision based on the record established in the trial court, this Court will review the trial court's decision without deferring to the decision of the district judge. *Robinson v. Joint Sch. Dist. No. 331*, 105 Idaho 487, 490, 670 P.2d 894, 897 (1983).

The adoptive parents argue that the trial court's decision that the child was not eligible for membership in the tribe is a question of fact to which we must give deference on appeal if it is supported by substantial and competent evidence. This mischaracterizes the issue. Whether the trial court correctly applied ICWA to the facts of the case requires this Court to examine the legal theories employed by the trial court in determining that the child was not eligible for membership in the tribe. This is a question of law and is subject to free review by this Court.

When a child custody matter requires a state court to resolve whether a child is an Indian child, the state court must make the necessary determinations regarding application of ICWA. This includes determining whether the child meets the definition of an Indian child contained in 25 U.S.C. §1903(4). In this case, the trial court correctly looked to federal guidelines published by the BIA to aid its determination. The BIA guidelines state:

B.1. Determination That a Child is an Indian

> (a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe . . . .
>
> (b)(i) The determination by a tribe that a child . . . is or is not eligible for membership in that tribe . . . is conclusive.

44 Fed. Reg. 67,584 (1979)

The enrollment director for the tribe stated in an affidavit admitted in evidence at the May 21, 1990 hearing:

> 3. That the primary consideration is [sic] permitting a tribal member to enroll his or her child is residency on the reservation at the time of the child's birth, but . . landownership may substitute for residency;
>
> 4. That [the father] has owned land on the reservation since 1987;
>
> 5. That an additional requirement for enrolling a child is

providing a birth certificate naming a tribal member as a parent;

> 6. That the birth certificate is missing from [the child's] application;
>
> 7. That a Paternity Affidavit signed by both parents naming a tribal member as a biological parent may substitute if the father's name does not appear on the birth certificate;
>
> . . .
>
> 11. That during the pendency of the application and prior to its vote, the Tribal Enrollment Committee can not state conclusively whether or not the applicant is eligible for enrollment with the [tribe];
>
> 12. That [the enrollment director] cannot at this time state with certainty that [the child] is eligible for enroll ment with the [tribe] because [the child's] application is incomplete and without the required proof of eligibility, [the child] cannot be enrolled.

In applying the federal guidelines, the trial court concluded:

The [t]ribe has declined to find that [the child] is either eligible for membership in that Tribe or that [the child] is a member of that Tribe. Their determination is conclusive and therefore [the child] is not an Indian Child as defined in 25 USCS [sic] Sec. 1903(4) and the Indian Child Welfare Act is not applicable to this proceeding.

The trial court's decision amounts to imposing a requirement that a tribe reach a conclusive determination regarding a child's eligibility for membership as a prerequisite to application of ICWA. We do not read ICWA or the BIA guidelines to impose this requirement.

ICWA requires the state courts to determine application of ICWA. This includes a determination *by the trial court* whether the child is an "Indian child" as defined by ICWA. There is no requirement that a tribe must make a conclusive determination of a child's eligibility for membership in the tribe as proof that the child is an Indian child. The provision in the BIA guidelines requiring a state court to give conclusive effect to a determination by an Indian tribe as to a child's eligibility for membership in that Indian tribe is merely to aid state courts in deciding whether to apply ICWA. This directive does not require a tribe to determine a child's eligibility for membership before a state court may apply ICWA.

In addition, the statement in the enrollment director's affidavit is clearly not a "determination" as intended by the BIA guidelines. At most, it is a statement by the tribe that no determination was possible at that time. There is no evidence in the record to support a finding that the tribe determined the child is not eligible for tribal membership.

If a state court does not have a conclusive determination from the tribe or the BIA regarding a child's eligibility for tribal membership, the trial court must make its own determination regarding the child's eligibility for tribal membership. The party asserting the applicability of ICWA has the burden of producing the necessary evidence for the trial court to make its determination.

In this case, the evidence presented to the trial court established the applicability of ICWA. The evidence contained the

tribe's requirements for "enrollment." Although enrollment and membership are not synonymous, eligibility for enrollment is evidence that the requirements for membership are met. 44 Fed Re. 67,584, 67,586 (enrollment is a common but not exclusive evidentiary means of determining membership in a tribe). Enrollment is an administrative function. The core of the inquiry under ICWA is eligibility for membership in the parent's tribe. The affidavit of the enrollment director explains the only reason the tribe could not make a conclusive determination regarding the child's eligibility for enrollment was because the application was missing documentary evidence regarding paternity in the form of a birth certificate or paternity affidavit. The trial court, however, found that the father is one of the child's parents. This finding, together with the father's ownership of land on the reservation, establishes the child's eligibility for membership in the tribe. The other requirements for enrollment go to the administrative aspect of enrollment and are not requirements of eligibility for tribal membership.

IV.
THE TRIAL COURT INCORRECTLY APPLIED AN "INDIAN FAMILY" REQUIREMENT.

The tribe also challenges the trial court's alternative holding that an Indian child must be part of an "Indian family" before ICWA applies. The tribe asserts this is an improper restriction on the application of ICWA. We agree.

The trial court's use of an Indian family requirement as a prerequisite to application of ICWA is a question of law to which this Court gives free review.

Although an Indian family requirement has been applied by the courts of other states, we believe that the United States

Supreme Court has effectively undermined the imposition of this requirement.

In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989), the Supreme Court held that federal domicile law applies in state court proceedings involving ICWA and that the parents' tribe has exclusive jurisdiction over the child custody proceeding even though the illegitimate Indian children in that case had never been on the reservation, with their Indian parents, or within the Indian culture. *Mississippi Choctaw* indicates that the jurisdictional provisions of ICWA apply to child custody proceedings involving Indian children regardless of where the children are born or where they are proposed for adoption. This application of ICWA is based on the interest the tribe has in its children.

In this case, application of an Indian family requirement would allow the non-Indian mother to circumvent application of ICWA and the tribe's interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family. This would undermine the tribe's interest in its Indian children, which the Supreme Court recognized in *Mississippi Choctaw*.

We also reject application of an Indian family requirement because the provisions of ICWA do not contain any limitation based on where the child is located. Limiting ICWA to situations in which an Indian child is being removed from an existing Indian family is, therefore, a judicially created exception to ICWA. Congress passed ICWA to limit state court power by creating mandatory protective procedures and minimum evidentiary standards that must by applied in child custody proceedings concerning Indian children. In light of the structure and nature of ICWA, it is inappropriate to use a judicially created exception to circumvent the mandates of ICWA.

V.
ICWA IS NOT INAPPLICABLE IN THIS CASE ON THE GROUND THAT THERE IS NO PROOF OF THE FATHER'S PATERNITY.

The adoptive parents invite this Court to find that the trial court's decision concerning the applicability of ICWA is harmless. They ask us to avoid remanding the case back to the trial court by finding ICWA does not apply because the tribe did not sufficiently prove the father's paternity. This is the approach taken by the district judge on appeal. We decline the invitation to find ICWA is inapplicable for this reason.

The district judge held that the requirements of ICWA do not apply in this case because the tribe failed to prove that the child was the child of the father. We reject this because it undermines findings of fact of the trial court.

In its order, the trial court specifically found that the father was one of the child's parents. This is a finding of fact that will not be overturned on appeal if it is supported by substantial and competent evidence. We note that paternity was not an issue in this case. Neither the mother not the adoptive parents disputed the father's paternity. In fact, in their briefs to the district judge, neither party argued the issue of paternity.

The trial court had sufficient evidence to support its finding that the father was one of the child's parents. At the hearing on the motion to intervene, the tribe submitted a letter from the enrollment director for the tribe stating that the father had applied for the child's enrollment in the tribe. At the hearing for termination of parental rights, the trial court heard testimony from the father's sister that she had personally registered a paternity affidavit with the state of Idaho on the behalf of the father. The affidavit from the enrollment director for the tribe

submitted during the May 21, 1990 hearing indicates the father had signed a paternity affidavit that was on file with the tribe. The foregoing evidence taken together is sufficient to support the trial court's finding that the father is one of the child's parents.

VI.
WE DECLINE TO DECIDE THE FATHER'S RIGHTS AND THE PLACEMENT OF THE CHILD UNDER ICWA.

The adoptive parents assert that even if ICWA governs the proceedings, this Court should hold that ICWA's requirements were met and should not upset the termination of the father's parental rights or the placement of the child. We decline to do so.

We are acutely aware that more than three years have elapsed since the child was placed with adoptive parents. We understand the difficulty and danger of removing a child of this age from the home in which the child has been nurtured during this formative period. We cannot ignore, however, that the termination of the father's rights and the placement of the child by adoption were accomplished without applying ICWA.

In ordering the termination of the father's parental rights, the trial court employed the clear and convincing evidence standard of state law, rather than the beyond a reasonable doubt standard of ICWA. Following the termination of the father's parental rights, the trial court held an adoptive hearing in which the tribe was not represented or given the opportunity to present evidence. The trial court did not address the preference for adoptive placement under 25 U.S.C. § 1915(a).

The trial court must address the questions of termination and

placement under ICWA on remand.

VI.
WE REVERSE THE AWARD OF ATTORNEY FEES BY THE DISTRICT JUDGE.

Because we find the trial court was incorrect in not applying ICWA to the proceedings in this case, we reverse the district judge's award of attorney fees based on the district judge's finding that the claim was frivolous, unreasonable, or without foundation.

VII.
CONCLUSION

We reverse the trial court's decision that ICWA does not apply to the proceedings in this case, vacate the termination order, and remand the case to the trial court for further proceedings.

We reverse the district judge's award of attorney fees.

We award the tribe costs on appeal. The tribe did not request attorney fees on appeal.

BISTLINE, McDEVITT and TROUT, J.J., concur.

BAKES, J. Pro Tem., (following retirement on February 1, 1993), dissenting:

I believe we should follow the decisions of the Supreme Courts of Washington, Kansas and New Jersey in determining whether the Indian Child Welfare Act applied to this case. The decision of the United States Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597 (1989), relied on by this Court in this case, is not dispositive. The facts of the *Holyfield* case were very different. In *Holyfield* both the parents were Indians and both were domiciled on the reservation. The Supreme Court in *Holyfield* held that the

policy of the ICWA could not be defeated by "individual reservation-domiciled tribal members" intentionally leaving the reservation to have the child and put it up for adoption so that the child's domicile would not be on the reservation. *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S.Ct. at 1610.

The facts of this case are significantly different. The trial court's findings of fact, which are supported by the evidence in the record, conclude that the only contacts between the reputed Indian father and the non-Indian mother were away from the reservation; the non-Indian mother never lived with the reputed Indian father; and neither lived on the Indian reservation. Once the reputed Indian father learned that the non-Indian mother was pregnant he stopped all contact with her and never claimed paternity of the child. No Indian family or reservation domicile is involved in this case. All that is involved is a non-Indian woman, with no contacts with an Indian tribe or reservation, who became impregnated, allegedly by a man who reputedly is an enrolled member of an Indian tribe.

In contrast, both parents in the *Holyfield* case were of Indian heritage, both were domiciled on the reservation, and both parents were involved in the adoption process.

In the recent case of the *Matter of Adoption of Crews*, 825 P.2d 305 (Wash. 1992), the Washington Supreme Court quoted from the hearings of Congress to the effect that the purpose of the Act was to stop the breakup of Indian families by the "removal of Indian children from their families and the placement of such children in foster or adoptive [Indian] homes which will reflect the unique values of Indian culture. . ." 25 U.S.C. § 1901 (4)-(5). In quoting from *In re Adoption of Baby Boy L.*, 642 P.2d 168 (Kan. 1982), the Court in *Crews* agreed that:

> the underlying thread that runs throughout the entire Act [is] to the effect that the Act is concerned with the removal of Indian children from an existing family unit and the resultant breakup of the Indian family.

Matter of Adoption of Crews, 835 P.2d at 309.

For the breakup of an Indian family to occur it is necessary for an "Indian family" to exist. Recently the Oklahoma Supreme Court, in *Matter of S.C.*, 833 P.2d 1244 (Okl. 1992), similarly expressed the intent of the ICWA to be to prevent the "removal of Indian children form *an existing Indian Family unit and the resultant breakup of the Indian family*." *Matter of S.C.*, 833 P.2d at 1255 (emphasis added); see also *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988). While a child of Indian heritage must be involved in an adoption or foster placement for the ICWA to be applicable, the Act can also be reasonably interpreted to require that the placement of the child not breakup an "Indian family" unit. Where no Indian family unit has ever existed, no breakup of an Indian family unit can take place.

The rationale of these state cases, which hold that an Indian family unit must be present before the ICWA is applicable, is supported by more recent events in Congress. A 1987 amendment to the ICWA presented to the Senate by the Committee on Indian Affairs would have made application of the ICWA mandatory regardless of whether the child had "previously lived in Indian Country, in an Indian cultural environment or with an Indian parent." See S. 1976, 100 Cong., 1st Sess., 133 Cong. Rec. S18532, S18533 (daily ed. Dec. 19, 1987). The amendment never made it to the floor of the Senate and has not been presented since. Congress was well aware of the decisions employing the "existing Indian family" doctrine and apparently

chose not to change the statutory language of the ICWA to modify that interpretation, as the Oklahoma Supreme Court has observed. *Matter of S. C.*, 833 P.2d at 1255. The child involved in this case has never been part of an "Indian family", and accordingly, the ICWA does not apply to the facts of this case.